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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/599,624	06/22/2000	David Francis Gavin	8135&	8433

27752 7590 04/11/2003

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EXAMINER

LEVY, NEIL S

ART UNIT	PAPER NUMBER
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1616

DATE MAILED: 04/11/2003

19

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

09

Application No.

599624

Applicant(s)

Examiner

MSC Lem

Group Art Unit

1616

19

—The MAILING DATE of this communication appears on the cover sheet beneath the correspondence address—

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, such period shall, by default, expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).

## Status

- ☒ Responsive to communication(s) filed on 3/7/03
- ☐ This action is FINAL.
- ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 1 1; 453 O.G. 213.

## Disposition of Claims

- ☒ Claim(s) 1-54 is/are pending in the application.
- Of the above claim(s) 31-35, 39-41, 48-51 is/are withdrawn from consideration.
- ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- ☒ Claim(s) 1-30, 36-38, 42-47, 52-54 is/are rejected.
- ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- ☒ Claim(s) 1-54 are subject to restriction or election requirement.

## Application Papers

- ☐ See the attached Notice of Draftsperson's Patent Drawing Review, PTO-948.
- ☐ The proposed drawing correction, filed on \_\_\_\_\_ is ☐ approved ☐ disapproved.
- ☐ The drawing(s) filed on \_\_\_\_\_ is/are objected to by the Examiner.
- ☐ The specification is objected to by the Examiner.
- ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. § 119 (a)-(d)

- ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).
  - ☐ All ☐ Some\* ☐ None of the CERTIFIED copies of the priority documents have been received.
  - ☐ received in Application No. (Series Code/Serial Number) \_\_\_\_\_.
  - ☐ received in this national stage application from the International Bureau (PCT Rule 1 7.2(a)).

\*Certified copies not received: \_\_\_\_\_

## Attachment(s)

- ☐ Information Disclosure Statement(s), PTO-1449, Paper No(s). \_\_\_\_\_
- ☐ Interview Summary, PTO-413
- ☐ Notice of Reference(s) Cited, PTO-892
- ☐ Notice of Informal Patent Application, PTO-152
- ☐ Notice of Draftsperson's Patent Drawing Review, PTO-948
- ☐ Other \_\_\_\_\_

Office Action Summary

Receipt is acknowledged of Amendment and RCE each of 3/7/03. Please identify what this is a C.I.P. of. IDSs of 6/4 and 8/13/01, have been considered and initialed NL.

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 31-35, 39-41, 48<sup>51</sup> stand withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected invention and species, there being no allowable generic or linking claim. Applicant timely traversed the restriction (election) requirement in Paper No. 13.

It is to be noted that the species requirement did not ask for ultimate species, thus, any Zinc salt, any anionic surfactant and a cationic polymer as conditioning agent when present are recognized as elected species. No election or restriction was made regarding conditioning or combination compositions. The claims 48-50 presented methods that had been restricted out, As Group IV inadvertently considered under 35 USC paragraph 112; no longer considered. However, 26-27 are drawn to well known anti-dandruff compositions and are seen as limited embodiments of the Group I compositions, thus will be considered, as argued for by applicant in paper # 13. This examiner finds not a word regarding the negative limitation in the interview summary, nor in pages 60-63 as applicant professes. The examples are stated to be conventional formulation preparation. Note they are non-limiting (p.52, top). Exclusion can be done by simply claiming in the positive, in closed language.

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 52 is rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The New negative limitation is absent from the specification, which, provides for optionals without limits. Also, Applicant cannot exclude; examples require the same ingredient, at same amounts (Kathon CG).

Claims 1-30, 36-38, 42 and 54 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

There is no antecedent for chelating of claims 15, 16. Claim 1 has an indefinite recital @ b) – which is it; greater than or about, what %; 1%; .9%; 1.1?

The same with other independent claims.

Claims 1-10, 13-22, 25-30, 36-38, 42-47, 52-54 are rejected under 35 U.S.C. 102(e) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Kappock et al 5939203.

Kappock @ col. 1, (missing from applicant's submitted copy shows pyrithiones are well known antimicrobial additives useful in a myriad of applications – cosmetics and toiletries (col. 5, lines 40-43, col. 1, lines 22-46) and as anti dandruff agent in shampoos and hair products. Also stated is reduced antimicrobial (col. 2, lines 47-54) because of precipitation, thus unavailability, of pyrithione (col. 2, lines 98-47) due to an

excess of cations. Kappock shows an aqueous medium of 0.01-2% pyrithione salt with 0.001-10% Zinc oxide can be used as a topical (coating) composition (col. 3, lines 5-25). It is seen that the zinc oxide protects pyrithione from light pyrithione (col. 3, line 61). 10% Zinc oxide to 2% pyrithione is 5:1. The instant ranges and ratios are seen as encompassing those of Kappock and as the preferred components are as instantly claimed, the degree of precipitation would also be the same, although the 50% insoluble is not present in so many words. No chelating agents are specified as required, but may be present (zinc hydroxide, col. 4, lines 58-60). Surfactants and thickener are optional, as are biocides (col. 6, 7), as are polyalkylene glycols, talc.

Claims 1-22, 25-28, 36-38, 47, 52, 53 are rejected under 35 U.S.C. 102(b) as being anticipated by Park – 1997-010124.

Here, too composition of antidandruff Zinc pyrithiones @ 10/1 to 1/50 are known (P.2), with the instant chelaters, surfactants and salts (Table 1). Zinc pyrithione is at 0.5%, Zinc salts @ .5-1.5% (Table 1) Example 8-14 show insoluble (emulsified) forms of zinc pyrithione. Some chelater examples are present – (Table 4) as are antimicrobials sodium lauryl sulfate. Anionic (and coat ionic components are present (Table 1).

Claims 1-30, 36-38, 42-46, 53 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Wiese-5227156.

The rejection of record is maintained. The instant inventive composition is here; the identical active, salts, additives, at about the same concentrations and ratios; See Example 2; about 5/100 of zinc oxide to pyrithione zincchloride.

Applicant's arguments filed on 3/17/03 have been fully considered but they are not persuasive. Applicants amendments have resulted in withdrawal of 112 rejection, and required new 112's. References correlatives to use of amandine as anti-dandruff is presented. Applicants Wiese arguments are not persuasive, absent "consisting of" language, Wiese preempts the claimed invention.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Neil Levy whose telephone number is (703)308-2412. The examiner can normally be reached on Tuesday through Friday 7 AM to 5:30 Pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jose Dees can be reached on (703) 308-4628. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 308-4556 for regular communications and (703) 872-9307 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1235.

Levy/LR  
April 11, 2003



NEIL S. LEVY  
PRIMARY EXAMINER